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PERMODALAN NEGERI SELANGOR BHD v. MENTERI KEWANGAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-343-11-2020]
17 MARCH 2024

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Abstract – *(i) An order in the nature of mandamus is a command issued to a public body or authority to perform a public duty mandated by law which it had failed/omitted to do. Mandamus does not lie to perform and only lies where the applicant has a legal right to compel the performance of a statutory duty; (ii) One of the basic requirements to obtain a declaration is to secure a proper contradictor as a defendant, ie, the person to oppose the declaration. Without a proper contradictor, absolutely no success could be envisaged for the relief of declaration at the substantive stage; (iii) The existence of a 'decision', 'action' or an 'omission' is necessary to commence statutory judicial review proceedings.*

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ADMINISTRATIVE LAW: *Judicial review – Application for leave – Mandamus – Request by applicant for Minister of Finance ('Minister') to give directions to Director General of Inland Revenue ('DGIR') to set aside impugned assessments and/or exempt tax raised – Minister did not respond – Applicant treated Minister's non-response as rejection of request – Applicant sought order that Minister exercises powers to set aside or exempt DGIR's assessments – Whether order sought in nature of mandamus – Whether ingredients of mandamus satisfied – Whether applicant had legal right to compel performance of duty provided by statute – Income Tax Act 1967, ss. 127(3A) & 135*

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ADMINISTRATIVE LAW: *Judicial review – Application for leave – Declaration – Request by applicant for Minister of Finance ('Minister') to give directions to Director General of Inland Revenue ('DGIR') to set aside impugned assessments and/or exempt tax raised – Minister did not respond – Applicant treated Minister's non-response as rejection of request – Applicant sought declaration that it was not engaged in any tax avoidance transaction – Whether Minister made any decision of rights of applicant – Whether Minister proper contradictor – Income Tax Act 1967, ss. 127(3A) & 135*

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REVENUE LAW: *Income tax – Judicial review – Application for judicial review – Request by applicant for Minister of Finance ('Minister') to give directions to Director General of Inland Revenue ('DGIR') to set aside impugned assessments and/or exempt tax raised – Minister did not respond – Applicant treated Minister's non-response as rejection of request – Whether there was 'decision', 'action' or 'omission' to commence statutory judicial review proceedings*

I

The applicant, a wholly-owned subsidiary company of the Menteri Besar Selangor Incorporated ('MBI'), was engaged in the businesses of investment holding, investment property holding and property development. By way of a trust deed and a power of attorney, 11 parcels of land were provided by MBI to the applicant for development purposes. The applicant was the beneficial owner of these land parcels even though they were registered in the name of MBI. In 2013, the applicant, MBI and Tropicana Aman Sdn Bhd ('Tropicana') entered into a sale and purchase *cum* development agreement for the transfer of the land parcels to Tropicana to undertake mixed and commercial developments on the said land parcels, among others, a flood mitigation project. In 2017, the Director General of Inland Revenue ('DGIR') conducted a tax audit on the applicant for the years of assessment ('YAs') 2010 to 2015 and the applicant disagreed with the DGIR's findings. The DGIR later informed the applicant that there was no form of compulsory acquisition with regard to the disposal of the land parcels and the transactions involving the lands were to avoid tax implications. The applicant and the DGIR agreed to settle the matter by entering into an agreement, pursuant to s. 96A(1) of the Income Tax Act 1967 ('Act'). The applicant then wrote to the DGIR stating that the flood mitigation project had been called off and that the land parcels would be returned to the Selangor State Government, as resolved by the applicant's Board. This resulted in the DGIR issuing notices of assessment for the YAs 2010 to 2015, inclusive of penalty, along with a notification of reduced assessment for the YA 2015. The applicant applied for a review of the said notices of assessment but the DGIR maintained his position and proceeded to issue the impugned assessments. This prompted the applicant to submit a request to the Minister of Finance ('Minister') to give directions to the DGIR to set aside the impugned assessments and/or exempt the tax raised. When the Minister did not respond, the applicant treated the non-response as a rejection of its request. Hence, the present application for leave to commence judicial review, for the following reliefs: (i) an order that the Minister exercises his powers, pursuant to ss. 135 and/or 127(3A) of the Act, to set aside or exempt the DGIR's assessments; and (ii) a declaration that the applicant was not engaged in any tax avoidance transactions.

Held (dismissing application):

(1) The first relief sought by the applicant, for an order compelling the Minister to exercise his power under ss. 135 and/or 127 of the Act, was in the nature of *mandamus.* The relief was misconceived in law as the ingredients of a *mandamus* order were absent. If *mandamus* could not issue, there could be no arguable case to be investigated at the substantive stage. *Mandamus* does not lie to perform and only lies where the applicant has a legal right to compel the performance of a duty

provided by the statute. The use of the word 'may', in both ss. 135 and/or 127(3A) of the Act, confers discretionary power, and not a duty, on the Minister. (paras 32 & 33)

(2) The second relief sought by the applicant, for a declaration that the applicant was not engaged in any tax avoidance transaction, suffered from the following infirmity. The Minister had not made any decision of the rights of the applicant and it was the DGIR who found that there was tax avoidance, based on the documentary evidence, and that it was an important factor in raising the impugned assessments against the applicant. For this reason, the proper contradictor was the DGIR and not the Minister. The DGIR was the proper person to be cited as a party to oppose the declaration sought. This Minister did not make the impugned assessments; in fact, he did nothing. In the absence of a proper contradictor, in the form of the DGIR, the declaration could not issue. (paras 36 & 38)

(3) A non-response to the request to exercise the power conferred on the Minister is either an 'omission' or a 'refusal to make a decision'. An omission is subject to a judicial review by way of an order in the nature of *mandamus* if the ingredients to grant such an order are present. In the present application, the ingredients to grant an order in the nature of *mandamus* were not present. As both ss. 135 and/or 127(3A) confers a power with a discretion, and not a duty, on the Minister, the non-response by the Minister would not be subject to judicial review. (para 39)

(4) The Minister had no power to do what the applicant was requesting him to do under ss. 135 and/or 127(3A) of the Act. As such, there was no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for, *ie*, *mandamus*, *certiorari* and declaration, on the materials presented. The applicant was claiming to be exempted, not from lawfully determined tax, but from illegally and/or unlawfully levied tax. That was not the purpose of s. 127(3A) of the Act. Section 127(3A) of the Act was to exempt tax lawfully levied tax; it was axiomatic that only lawful levied tax could be exempted. Therefore, the exemption sought was something that the Minister clearly had no power of doing. To set aside the unlawfully levied tax by the DGIR, the applicant must approach the Special Commissioners of Income Tax by way of an appeal or, if allowed, by the High Court by way of judicial review. There could be no arguable case in respect of ss. 135 and/or 127(3A) of the Act. (paras 56, 61 & 62)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Council Of Civil Service Unions v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun [2016] 7 CLJ 143 FC ***(refd)***

Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] 3 CLJ 653 FC ***(refd)***

Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***

Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd [1980] CLJU 150; [1980] 1 LNS 150 FC ***(refd)***

Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] CLJU 280; [2013] 1 LNS 280 CA ***(refd)***

Peguam Negara v. CMMT Investment Limited (Civil Appeal No. W-01(IM)-575-10-2021) (Unreported) ***(refd)***

R v. Central Professional Committee for Opticians [1949] 2 All ER 519 ***(refd)***

Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd [1961] CLJU 102; [1961] 1 LNS 102 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi [2015] 9 CLJ 110 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Zainal Hj Nasiruddin v. The Registrar of Societies [2012] CLJU 939; [2012] 1 LNS 939 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), Schedule para 1

Federal Constitution, arts. 4(1), 5(1), 8(1), 10(1)(c), 121(1)

Income Tax Act 1967, ss. 96A(1), 99, 100, 101, 102, 113(2), 127(3A), 135, 140(1)(c), (5), Schedule 5, paras 26, 34

Legal Profession Act 1976, s. 46A(1)

Rules of Court 2012, O. 53 rr. 1(1), 2(2), (4)

Other source(s) referred to:
MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, p. 615

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For the Attorney General's Chambers - Liew Horng Bin; SFC

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 4 December 2023, I dismissed the application for leave to commence judicial review proceedings brought by the applicant, Permodalan Negeri Selangor Berhad against the Minister of Finance ("the Minister") for the following reliefs (encl. 1):

(i) an order that the Minister exercise his powers under s. 135 and/or s. 127(3A) of the Income Tax Act 1967 ("ITA") to set aside or exempt the Director General of Inland Revenue's ("DGIR") assessment *vide* notices of additional assessment dated 4 November 2020 for the years of Assessment ("YA") 2012, 2013 and 2014 on the ground that the assessments made were illegal, void, unlawful, in excess of authority, irrational, unreasonable and/or which resulted in a denial of the applicant's legitimate expectation ("the impugned assessments"); and

(ii) a declaration that the applicant was not engaged in any tax avoidance transaction.

[2] It is pertinent to note that the impugned assessments were made by the DGIR. There are specific provisions in the ITA which expressly provide an aggrieved taxpayer to appeal against such assessments to a specialised body established by the legislature for such purposes ("statutory avenue of appeal"). The body the appeal is made to is known as the Special Commissioners of Income Tax ("Special Commissioners") which is conferred power to confirm or discharge the assessment made by the DGIR or direct the DGIR to amend the assessment specified by it.

[3] In the instant case, the applicant did not appeal to the Special Commissioners against the assessments made by the DGIR. Instead, the applicant applied to the Minister by a letter dated 13 November 2020 requesting that:

(i) the Minister exercises his power under s. 135 of the ITA for a direction to be made to the DGIR to set aside the impugned assessments; and/or

(ii) the Minister exercises his power to exempt the tax assessed by the DGIR under s. 127 of the ITA.

[4] I dismissed the application for leave on the basis that the application is fatally flawed and therefore, is a frivolous and vexatious application and/oran abuse of the process of the court. My reasons are as follows.

The Background Facts

[5] The applicant is a company incorporated in Malaysia and a wholly owned subsidiary of the Menteri Besar Selangor Incorporated ("MBI"). The applicant is principally engaged in the businesses of investment holding, investment property holding, and property development.

[6] *Vide* a trust deed and power of attorney both dated 13 January 2012, eleven parcels of land ("the land parcels") were provided by MBI to the applicant for development purposes. While the land parcels were registered in the name of MBI, the applicant was the beneficial owner of the land parcels.

[7] On 15 April 2013, a sale and purchase *cum* development agreement was entered into by the applicant, MBI and Tropicana Aman Sdn Bhd ("Tropicana") for the transfer of the land parcels to Tropicana to undertake mixed and commercial developments on the land parcels, among others, a flood mitigation project. A deed of substitution of power of attorney dated 19 April 2013 was executed in favour of Tropicana for this purpose.

[8] Thereafter, the applicant said that it realised that the abovementioned documents had been erroneously prepared and took measures to have the documents rectified and put into proper perspective by executing the following instruments:

(i) deed of revocation of trust deed dated 7 August 2014;

(ii) deed of revocation of power of attorney dated 7 August 2014;

(iii) management agreement between MBI and the applicant dated 7 August 2014;

(iv) supplementary agreement to the sale & purchase cum development agreement between MBI, the applicant and Tropicana dated 7 August 2014;

(v) trust deed between the applicant and MBI dated 7 August 2014;

(vi) power of attorney made by MBI dated 7 August 2014; and

(vii) deed of substitution of power of attorney made by the applicant dated 13 August 2014.

[9] Sometime in early 2017, the Director General of Inland Revenue ("DGIR") conducted a tax audit on the applicant for the YAs 2010 to 2015 and upon conclusion of the audit informed the applicant of his findings including his revised tax computations in a letter dated 14 June 2017. In the letter, the DGIR sought feedback from the applicant on its findings. The

applicant disagreed with the findings of the DGIR and responded by providing explanations on the issues that arose from the DGIR's findings by a letter dated 13 July 2017. The explanation included its views with regard to the tax treatment concerning the disposal of the land parcels by MBI to the applicant.

[10] On 1 August 2017, a meeting was held between the parties for the applicant to ventilate its position. Pursuant to this meeting, the DGIR in a letter dated 7 August 2017, responded stating that there was no form of compulsory acquisition with regards to the disposal of land parcels as alleged by the applicant and according to the minutes of the State Executive Council meeting and the minutes of the applicant's Board of Directors, it was clearly stated that the transactions involving the lands were to avoid tax implication.

[11] The applicant and the DGIR agreed to settle the matter by entering into an agreement pursuant to s. 96A(1) of the ITA. The applicant, through its tax agent, on 16 January 2018 submitted the following documents and payments to the DGIR:

(i) a duly executed agreement pursuant to s. 96A(1) of the ITA;

(ii) a duly executed declaration certificate;

(iii) a directors' circular resolution;

(iv) two cheques amounting to RM51,782,200; and

(v) 12 post-dated cheques of RM3,089,000 each.

[12] The applicant then wrote to the DGIR stating that the flood itigation project had been called off and that the land parcels will be returned to the Selangor State Government as resolved by the applicant's board way back on 23 June 2010.

[13] As a result, the DGIR issued notices of assessment for the YAs 2010 to 2015 dated 2 August 2019 inclusive of penalty, along with a notification of reduced assessment for the YA 2015 dated 2 August 2019. The applicant applied for the said notices of assessment to be reviewed but the DGIR maintained his position and stated his intention of issuing the notices of additional assessment inclusive of penalties under s. 113(2) of the ITA.

[14] The applicant then informed the DGIR that the duly executed agreement submitted pursuant to s. 96A(1) of the ITA on 16 January 2018 was void. The DGIR on 4 November 2020 proceeded to issue the impugned assessments invoking s. 140(1)(c) of the ITA.

The Subject Matter Of The Instant Application

[15] On 13 November 2020, the applicant submitted a request to the Minister to give directions to the DGIR to set aside the impugned assessments under s. 135 of the ITA and/or to exempt the tax raised under s. 127(3A) of the ITA.

[16] In the said letter, the Minister was given an ultimatum to make the necessary directions and/or to exempt the tax by 23 November 2020, failing which the applicant will exercise its legal rights. When the Minister did not respond by the specified date, the applicant treated the non-response as a rejection of its request. Two days later, on the 25 November 2020, the applicant filed the instant application for leave to commence judicial review proceedings for the two reliefs stated above.

The Grounds Of Review

[17] The grounds of review stated in the O. 53 statement are as follows:

(i) the Minister failed to consider that the DGIR's impugned assessments were *ultra vires*, illegal, void, unlawful, and/or in excess of authority for the following grounds:

(a) that MBI being a statutory authority established by a State Enactment is exempted from income tax by virtue of the Income Tax (Exemption) (No. 4) Order 2003 and the Income Tax (Exemption) (No.22) Order 2006. As such there is no basis for the DGIR in alleging that the applicant had the intention of avoiding taxes;

(b) the DGIR had failed to discharge the burden of proof that the applicant had undertaken the practice of tax avoidance under s. 140(1)(c) of the ITA; namely, that the applicant had made incorrect returns with the aim of avoiding taxes;

(c) the DGIR has infringed s. 140(5) of the ITA as no particulars of assessment or in any event, proper particular of assessment were issued to the applicant together with the notices of the additional assessments; and

(d) there was no basis for the DGIR to allege tax avoidance on the part of the applicant as the applicant and its holding company, MBI, are all owned by the Government of a State, in this case the State of Selangor;

(ii) the decision was irrational in that no reasonable person similarly circumstanced as the Minister could have come to such decision, especially when there are no reasons given by the Minister for his decision not to give a direction to the DGIR to set aside his assessment and/or exempt the arbitrarily raised taxes.

(iii) the Minister's decision was irrational in that he failed to consider that the DGIR:

(a) had disregarded the fact that the transactions entered into by the applicant were necessary to rectify the incorrect earlier transactions

and to put matters into proper perspective, and the fact that the land parcels were subsequently returned to MBI after the flood mitigation project was called off;

(b) had failed to consider that the applicant at all material times acted in good faith, gave full co-operation, made full and frank disclosure, and obtained professional advice in managing its finance and tax affairs;

(c) had failed to consider that the decisions of the superior courts in relation to the interpretation and construction of legislation and case law are part of the laws of Malaysia and binding on the DGIR who had clearly failed to take cognisance of those decisions; and

(d) had failed to appreciate and give effect to the provisions of the ITA amounted to a clear contravention of art. 96 of the Federal Constitution.

Attorney General's Submissions

[18] The Attorney General submitted that one has to second guess from the O. 53 statement whether it is a decision" or "action" of the Minister or an "omission" of the Minister that is being challenged. The applicant is ambivalent as to whether what it is challenging is a "decision" or "action" or "omission". However, the executory order for which leave is sought while not in clear terms is in the nature of *mandamus* since the words seek the court to make an order compelling the Minister to exercise his powers under ss. 135 and/or 127(3A) of the ITA.

[19] It is trite that an order in the nature of *mandamus* does not lie to exercise a power but to carry out a duty imposed by law. The declaration for which leave is sought is to impugn the impugned assessments made by the DGIR. Since there is already a specific appeal mechanism enacted by the legislature in the ITA *ie*, an appeal to the Special Commissioners in the form of s. 99 of the ITA against the impugned assessment a declaratory order would not lie. Authorities are abundant but it suffices to refer to *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd* [1980] CLJU 150; [1980] 1 LNS 150; [1981] 1 MLJ 234. More so, when in this case the applicant had in fact availed itself of the statutory appeal remedy *vide* Form Q dated 7 December 2020.

[20] As a result, it is submitted that the test for granting leave cannot be satisfied for the following reasons:

(i) first, there is no arguable case in favour of granting the order in the nature of *mandamus* at the substantive hearing against the Minister;

(ii) second, there is an alternative appeal remedy specifically provided by the legislature for which the declaratory relief would not lie; and

(iii) third, what is sought from the Minister would usurp the appeal and adjudicatory function of the Special Commissioners as the Minister would be sitting on appeal against the impugned assessments.

[21] In the circumstances, it was submitted that it would be an abuse of the process of the court for filing this application against the Minister when the applicant has an appeal pending against the impugned assessments before the Special Commissioners. It was submitted that the test for granting leave cannot be satisfied.

Decision Of The Court

The Applicant's Case

[22] It is important to first and foremost put the applicant's case in perspective. The applicant is suing the Minister, not the DGIR. I begin with the grounds of review. It is clear that the grounds of review refer to a "decision" made by the Minister and that the said "decision" was being challenged essentially on the grounds of irrationality *ie*, the failure of the Minister to appreciate the various errors of law committed by the DGIR in making the impugned assessments.

[23] However, the facts pleaded in the affidavit in support of the application reveal that when the Minister did not make the decision as requested by the deadline (set by the applicant) to exercise the power under ss. 135 and/or 127(3A) of the ITA, the applicant treated the failure as a decision rejecting the applicant's request. This is stated in para. 11 of the applicant's affidavit verifying facts filed in support of the leave application. This would explain the order sought for compelling the Minister to exercise his powers under the said sections.

[24] Matters are further exacerbated when in the supplementary written submission dated 18 August 2023, the applicant contended that there need not always be an actual decision in order for judicial review to be brought. A non-decision is amenable to judicial review so long as the non-response affects the applicant either by altering his rights or obligations or by depriving him of the which he has been permitted to enjoy.

[25] The pleading and submission of the applicant are confusing:

(i) the grounds of review in the O. 53 statement state that a "decision" was made;

(ii) the affidavit verifying facts in support of the application state that a "deemed decision" was made when the applicant treated the failure to decide on the request made as a decision rejecting the request;

(iii) in the supplementary written submission, a non- decision is amenable to judicial review, (d)).

[26] If this is not confusing enough, leave is sought for an order compelling the Minister to exercise his powers under s. 135 and/or s. 127(3A) of the ITA to set aside or exempt the impugned assessments. Implicit for an order compelling a tribunal or body or person to do something is an "omission" of the tribunal or body to do the said thing. Thus, the order that is sought in the leave application is in the nature of *mandamus* to compel the Minister to exercise his powers.

[27] Lastly, a declaration is sought to the effect that the applicant was not engaged in any tax avoidance transaction.

The Law And Test For Leave

[28] This court was moved pursuant to O. 53 of the Rules of Court 2012. Order 53 r. 1(1) provide that the order shall govern all applications seeking relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964. Amongst the reliefs are orders in the nature of *certiorari* and *mandamus*.

[29] It is trite that the relief of *certiorari* is to quash a "decision" or "action" while *mandamus* is relief against an "omission" and is subject to Chapter VIII of Part II of the Specific Relief Act 1950. Added to these reliefs, pursuant to O. 53 r. 2(2) is a prayer for declaration, either jointly or in the alternative in the same application if it relates or is connected to the same subject matter.

[30] This brings me to the established test to decide whether leave is to be granted or otherwise. The test is described by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 in the following words:

> Without the need to go into the depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e. unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[31] The test in *WRP Asia Pacific Sdn Bhd* envisages three categories where leave of court will be refused:

(i) where the application is found to be 'frivolous and vexatious'. What is frivolous and vexatious would depend on the facts of the case and include applications which are an abuse of the process of the court;

(ii) where an arguable case for further investigation at the substantive stage is not made out. The threshold for this category is very low. All that is required at this stage is for the judge to peruse the material placed before the court by the applicant and see whether "an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome". Leave of court is granted in all cases except cases where "absolutely no success may be envisaged"; and

(iii) where the subject matter for review is not amenable to judicial review. This category includes non-justiciable matters, policy considerations, and management prerogatives.

The Reliefs Of Mandamus And Declaration Are Misconceived

[32] The first is the relief for an order compelling the Minister to exercise his power under ss. 135 and/or 127(3A) of the ITA. This order is in the nature of *mandamus*. I find that the relief is misconceived in law because the ingredients of an order in the nature of *mandamus* are absent. If *mandamus* cannot issue there can be no arguable case to be investigated at the substantive stage.

[33] The reason being that *mandamus* does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided by statute. The use of the word 'may' in both ss. 135 and/or 127(3A) of the ITA confers discretionary power and not a duty on the Minister. For ease of reference, the sections are reproduced below. s. 135 of the ITA states:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act, and the Director General shall give effect to any directions so given.

while s. 127(3A) of the ITA states:

> The Minister may, in any particular case exempt any person from all or any of the provisions of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

[34] There is a plethora of authorities on the point and it is sufficient to cite the following instructive extract from MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, at p. 615 (see Court of Appeal decisions of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 and *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] CLJU 280; [2013] 1 LNS 280; where the same extract from earlier edition of the book were applied):

> *Mandamus* is thus a very wide remedy which is available against a public officer to see that a duty is performed or carried out, in accordance with law. Enforceable by *mandamus* is a duty of a public nature, the performance of which imperative and not optional or discretionary. Thus, if an officer has power, rather than a duty, and does not use such power, *mandamus* is not issued if the officer refuses to exercise the power for the wrong reasons.

[35] The decision in *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179 is relevant. There an order of *mandamus* was sought directing the Chief Justice to respond to the applicant's request under s. 13 of the judges' Code of Ethics 2009 to act in the manner dictated by the applicant. It was

held that there must be under the law some duty cast upon the public officer before an order of *mandamus* can be made. If the public officer does not carry out his duty, the court will call upon him to perform that duty by an order of *mandamus*. The court found that s. 13, from the language used, did not impose a duty on the Chief Justice to act in a manner dictated by the applicant. The principle was lucidly stated as follows:

> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, a *mandamus* is not issued to compel him to exercise his power.

[36] The second relief for which leave is sought is the declaration that the applicant was not engaged in any tax avoidance transaction. This relief suffers from the following infirmity. On the undisputed facts, the Minister has not made any decision of the rights of the applicant and it was the DGIR who found that there was tax avoidance on the documentary evidence before him and was an important factor in raising the impugned assessments against the applicant. For this reason, the proper contradictor is the DGIR and not the Minister. The DGIR is the proper person to be cited as a party to oppose the declaration sought.

[37] In this regard the law is trite. In *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143 and *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403, the Federal Court held that one of the basic requirements to obtain a declaration is to secure a proper contradictor as defendant *ie*, the person to oppose the declaration. The law was stated as follows in *Hassan Marsom*:

> [115] The power to grant a declaration has been stated by Raja Azlan Shah Ag LP (as His Lordship then was) "to be exercised with a proper sense of responsibility and after a full realisation that judicial pronouncement ought not to be issued unless there are circumstances that properly call for their making" (see *Dato' Menteri Oth man Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28 ....
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> [116] Speaking on the same subject matter, Lord Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 QB 554 observed:
>
> > The wide scope of it can be seen from the speech of Viscount Kilmuir L.C. in *Vine. v. National Dock Labour Board* [1957] AC 488, 498 from which it appears that if a substantial question exists in which one person has a real interest to raise, and the other to oppose, then the court has the discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

> [117] In *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 343; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64 Abdul Hamid CJ (Malaya) referred to Declaratory Orders 2nd edn by PW Young on the condition to be satisfied for the grant of such orders as:
>
> (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.
>
> His Lordship also referred to the observation of Lord Dunedin in *The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 at p. 448:
>
> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

[38] The DGIR is the proper contradictor, not the Minister. The Minister did not make the impugned assessments. He in fact did nothing. He did nor even respond to the applicant's request. On the other hand, it was the DGIR who made the impugned assessments and made the finding that the applicant had engaged in tax avoidance based on the evidence before him. Yet the applicant opposed the application of the DGIR to intervene as a party to this leave application. In the absence of a proper contradictor in the form of the DGIR, the declaration cannot issue. Without a proper contradictor, absolutely no success can be envisaged for the relief of declaration at the substantive stage. On this ground alone, the application for leave must fail.

Whether A Non-response Is Amenable To Judicial Review

[39] A non-response to the request to exercise the power conferred on the Minister is either an "omission" or a "refusal to make a decision". An omission is subject to judicial review by way of an order in the nature of *mandamus* if the ingredients to grant such an order is present. As shown above, the ingredients to grant an order in the nature of *mandamus* are not present. Specifically, an order in the nature of *mandamus* is a command issued to a public body or authority to perform a public duty mandated by law which it had failed or omitted to do. In the instant case, both ss. 135 and/or 127(3A) confer a power with discretion and not a duty on the Minister. Thus, a non-response by the Minister would not be subject to judicial review.

Whether An Actual Decision Is Required For Judicial Review

[40] In the applicant's supplementary written submission, the applicant cited *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697; [2002] 2 MLJ 413 which was followed in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 and submitted that there need not be an actual decision for judicial review to lie. Does this mean there was no decision or deemed decision made? This would be against what was pleaded by the applicant in its O. 53 statement and affidavit in support. Thus, there in the submission of Senior Federal Counsel that the ground of challenge is ambivalent as to whether this is a case challenging a "decision" or "an omission".

[41] The principle in *Sivarasa Rasiah* and the cases that followed it are distinguishable and does not apply to the instant case. The Court of Appeal decision in *Sivarasa Rasiah* must be read with the Federal Court decision in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor reported as* [2010] 3 CLJ 507 to get the full picture. When this is done one would see that the situation where a decision is not required is the type of judicial review known as "constitutional judicial review". In such a situation the constitutionality of a statutory provision is under review. The source of this type of judicial review is art. 121(1) read with art. 4(1) of the Federal Constitution.

[42] The second type of situation is where a "decision", "action" or "omission" is sought to be reviewed. This type of judicial review is known as statutory judicial review and is provided pursuant to s. 25(2) read with para. 1 of the Schedule to the Courts of Judicature Act 1964. The distinction was made and recently reiterated in *Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] 3 CLJ 653 in the following words:

> [62] To build upon what was stated in *SIS Forum* (*supra*), judicial review in its broadest sense calls upon the Judiciary to examine the exercise of powers. A constitutional judicial review, whether to challenge the validity of legislation or such as in this case, to interpret the FC itself, brings to light the question on how the constitutional provision should be applied. The statutory aspect of judicial review is when the exercise of those powers is questioned and judicial remedy is sought to bring those powers back into the confines of the law.

[43] The Court of Appeal decision of *Sivarasa Rasiah* relied by the applicant *ie*, [2002] 2 CLJ 697 concerned the application for leave that was dismissed by the High Court. In that case, an advocate and solicitor who was also an office bearer of a political party wished to be elected to the Bar Council. However, s. 46A(1) of the Legal Profession Act 1976 ("s. 46A(1)") prohibited him from doing so. The provision clearly disqualified office-bearers of political parties from being members of the Bar Council. Sivarasa Rasiah challenged the statutory disqualification by seeking leave of court to commence judicial review proceedings for the following reliefs: (i) a

declaration that notwithstanding holding office in a political party he is not disqualified from offering himself as candidate for election to the Bar Council; and (ii) a declaration that notwithstanding holding office in a political party he is not disqualified from being a member of the Bar Council. The grounds upon which he claimed that relief, in his O. 53 statement filed in support of the leave application was that s. 46A(1) is unconstitutional by reason of the breach of his fundamental rights enshrined in arts. 5(1), 8(1) and 10(1)(c) of the Federal Constitution.

[44] *Sivarasa Rasiah* failed to obtain leave in the High Court and appealed to the Court of Appeal. The submission by the Attorney General, at the Court of Appeal, was that the declarations sought by the applicant were not declarations that could be allowed by the court as there was no frontal assault on the constitutionality of s. 46A(1). The Court of Appeal agreed that the declarations cannot be granted even if the facts alleged are true but enunciated the principle that if the applicant has sought remedies to which he is patently not entitled to, but adduces facts and establishes grounds entitling him to relief, it is open to the judge hearing the substantive motion to grant relief that was pleaded but not claimed. It was held that the inadequacies of drafting, though justifiably made, comes to naught since the High Court had power to grant appropriate relief after hearing full argument on the substantive motion. In this respect, the court should adopt the flexible approach. The Court of Appeal granted leave on the basis that the appropriate relief was to declare s. 46A(1) of the LPA unconstitutional. The matter was remitted to the High Court with directions to reserve the motion for judicial review. At the High Court, the motion was amended to include a prayer to declare s. 46A(1) of the LPA unconstitutional. The case was obviously by its nature one where no "decision" is necessary as it is to review a legislation *ie*, by declaring s. 46A(1) of the LPA unconstitutional. If *Sivarasa Rasiah* was successful in declaring 46A(1) of the LPA unconstitutional, it would pave the way for the appellant to be elected to the Bar Council.

[45] But the instant application for leave does not concern a case of constitutional judicial review but statutory judicial review. For statutory judicial review a "decision", "action" or "omission" is necessary. Order 53 r. 2(4) of the Rules of Court 2012 states that any person who is adversely affected by the "decision", "action" or "omission" in relation to the exercise of the public duty or function is entitled to make the application.

[46] In judicial review proceedings, it is absolutely imperative that the impugned decision be properly identified and specifically stated in the application for leave. If the judicial review application is taken against the wrong authority or the wrong decision, then invariably the judicial review becomes incompetent. It is apposite in this regard to refer to the decision of

A the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 where the duty to identify the impugned decision was stated as follows:

> It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and,
B of course, of the decision itself. It is therefore a matter of the first importance to correctly identify the decision sought to be impugned ... Failure to observe these basic requirements could have fatal consequences as the following authorities will serve to illustrate ...

[47] Thus, the existence of a "decision" or "action" or an "omission" is
C necessary to commence statutory judicial review proceedings. The contention of the applicant is in the circumstances rejected.

Whether There Was A Refusal To Make A Decision

[48] The applicant had articulated the point in its abovementioned
D supplementary written submission that a non-decision can amount to a decision amenable to judicial review. The refusal to make a decision is amenable to judicial review according to the decision *Council Of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374; [1984] 3 All ER 935 where it was said that for a decision to be susceptible to the court's reviewing
E powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. This principle was approved by the Federal Court in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang*
F *Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490.

[49] The refusal to make a decision is a "decision" amenable to judicial
G review and liable to be quashed by an order of *certiorari*. There was a refusal to make a decision because the Minister did not respond to the applicant's letter requesting that the Minister exercise his power under ss. 135 and/or 127(3A) of the ITA as dictated.

[50] It is axiomatic that a refusal to make a decision is different from a
H decision rejecting the request by the applicant. In applying the liberal approach so that the applicant is allowed to seek leave for the order of *certiorari* for the refusal to make a decision, I had to consider whether the principles for a 'refusal to make a decision' were established. The leading authority is the decision in *Re Bukit Sembawang Rubber Co Ltd v. Sembawang*
I *Estates Ltd* [1961] CLJU 102; [1961] 1 LNS 102; [1961] 1 MLJ 269 and followed in *Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi* [2015] 9 CLJ 110. The principles can be summarised as follows:

(i) a refusal to make a decision may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply; and

(ii) there must be clear evidence of a refusal to act. This can be established primarily on the basis of an inordinately long delay as to amount to a refusal to consider and determine the application made to the decision-maker (*R v. Central Professional Committee for Opticians* [1949] 2 All ER 519).

[51] In my judgment, based on the facts alluded to by the applicants, there was no inordinate delay as the letter seeking directions and tax exemption was dated 13 November 2020. The Minister was only given until 23 November 2020 to exercise its powers as dictated by the applicant. This time frame does not evince an inordinate delay.

[52] For completeness, even if there is a decision that qualifies as a 'refusal to make a decision' that is susceptible to *certiorari* what can be quashed, if at all, is merely the decision refusing to make a decision. The case of *Zainal Hj Nasiruddin v. The Registrar of Societies* [2012] CLJU 939; [2012] 1 LNS 939; [2012] MLJU 1623 is instructive. There the applicant made an application to the Registrar of Societies ("Registrar") to register a political party. The Registrar did not make any decision either to refuse or to allow the application. It was held that an inordinate delay, without good reason, to make a decision amounted to a 'refusal to make a decision'. Ravinthran J (as His Lordship then was) held that such inordinate delay was unlawful and ultra vires the Societies Act 1966 but to compel the Registrar to register the political would be putting the cart before the horse as the Registrar has not made any decision as yet. An order of *mandamus* to compel the Registrar to make a decision whether to register the political party or not to register the political party within 21 days of the order was made by His Lordship.

[53] Thus, an application to quash a decision by a decision-maker not to make a decision must be accompanied by an order of *mandamus* to compel the decision-maker to make a decision on the matter as mandated by Parliament. The court cannot usurp this power. In the instant case, the power is conferred on the Minister. Without the accompanying order of *mandamus*, the applicant is only left with 'no decision made by the decision-maker'.

[54] Similarly, in the instant case, if the decision not to make a decision *ie*, decision not to exercise powers under s. 135 and/or 127(3A) of the ITA, is quashed, an order of *mandamus* to compel the Minister to exercise his powers must follow. However, as shown above, no order of *mandamus* can be made as ss. 135 and 127(3A) of the ITA confers discretionary power and not a duty on the Minister.

The Non-applicability Of Sections 135 And 127(3A) Of The ITA

[55] This is an additional ground to refuse leave on the premise that the application is frivolous and vexatious. Again, it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicants' requests; and (ii) that the assessments made by the DGIR are alleged to be illegal and/or unlawful *ie*, the tax illegally levied in law. The applicants came to the Minister to set aside the assessments made by the DGIR by way of directions to be given to the DGIR to set aside the same or the Minister himself exempt the tax as assessed by the DGIR.

[56] In my view, the Minister has no power to do what the applicant is requesting him to do under ss. 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for *ie*, *mandamus*, *certiorari*, and declaration on the material presented to this court. My reasons are as follows.

[57] The ITA is structurally designed and is divided into parts and chapters to take care of specific areas. The power to set aside any wrongful assessments in law lies with the Special Commissioners by way of an appeal under s. 99 of the ITA or in certain instances by the High Court by way of judicial review if special circumstances are shown. Sections 99 to 102 are in Chapter 2 under Part VI of the ITA which specifically provides for 'assessments and appeals'. An appeal envisaged in the sections is specifically and expressly directed against assessments made by the DGIR. The Special Commissioners are conferred with express power under para. 26 of Schedule 5 of the ITA to discharge or set aside or amend any assessments made by the DGIR. An appeal against the decision of the Special Commissioners lies to the High Court (s. 102 read with para. 34 of Schedule 5 of the ITA).

[58] Section 135 of the ITA is housed in Chapter 1 under Part X which solely concerns 'administration'. The purpose of the provision is for the Minister, when he is of the view it is required, to give directions of a general character as to the exercise of the functions of the DGIR, not inconsistent with provisions of the ITA, to the DGIR. The directions are administrative and general in nature and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments he had made in a particular case. Setting aside an assessment is not a matter concerning 'administration' falling within the purview of s. 135 of the ITA. The power to set aside an assessment is provided only by way of an appeal to the Special Commissioners and not to the Minister. The applicant is creating a new mechanism of appeal to set aside the DGIR's assessments. This is clearly an abuse of the process of the court and tantamount to a frivolous and vexatious application.

[59] Section 127(3A) of the ITA specifically confers power on the Minister to grant tax exemptions. The section is in Part IX of the ITA which concerns 'exemptions, remission, and other relief. Section 127(3A) of the ITA is an

empowering provision conferring power on the Minister to exempt a person from 'any provision' of the ITA or exempt 'any income of a particular kind or any class of income of a particular kind'. The section envisages that the person requesting exemption is lawfully liable to pay tax. But, in the instant case, what was sought to be exempted was a tax that should not have been levied since it is the applicant's pleaded case was that tax assessed was illegally, arbitrarily, and/or wrongfully assessed in law.

[60] It is the basic law that 'income tax is a tax on income' and 'exemption only becomes relevant when there is chargeable income, but not otherwise'. This principle was reiterated in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518 by the Court of Appeal referring to, amongst others, *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 where it was held that a tax exemption is only given after liability to tax has been determined in the following words:

> In other words, there must be a liability to income tax first, and then only the question of claiming exemption ... arises.

[61] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Section 127(3A) of the ITA is to exempt tax lawfully levied tax. It is axiomatic that only lawful levied tax can be exempted. Therefore, the exemption sought in the instant case is something that the Minister clearly has no power of doing. To set aside the unlawfully levied tax by the DGIR, the applicant must approach the SCIT by way of an appeal or if allowed, by the High Court by way of judicial review.

[62] For the above reasons there can be no arguable case in respect of ss. 135 and/or 127(3A) of the ITA.

Conclusion

[63] It was submitted that exactly the same applications as the instant application for leave had been allowed by the High Court and in one of those cases *ie*, *Peguam Negara v. CMMT Investment Limited* (Civil Appeal No. W-01(IM)-575-10-2021) the decision of the High Court was upheld by the Court of Appeal.

[64] It suffices to say that the said cases and *CMMT Investment Limited* are distinguishable on the admitted fact that the specific issues that arose for consideration in this case were not the subject matter of any of those cases.

[65] For the foregoing reasons, the application for leave was dismissed.